

MEMORANDUM OF LAW

DATE: January 24, 1990

TO: Ralph Shackelford, Purchasing Agent

FROM: City Attorney

SUBJECT: Public Contract Code Sections 4100 and 4107.5

You requested an opinion as to the required formality of hearings conducted regarding violations of California Public Contract Code sections 4107 and 4107.5. Section 4107(a)(7) calls for a "public hearing" in the case of objections by a listed subcontractor to a request by a prime contractor to substitute a subcontractor on a public works project. Section 4107.5 regards a claim of inadvertent clerical error by a prime contractor in listing subcontractors and requires a "public hearing as provided in section 4107" in order to allow the awarding authority to consent to the substitution of a subcontractor. In addition, language is included "that validity of claims of error shall be determined by utilizing declarations submitted under penalty of perjury, by testimony under oath and subject to cross examination." Id.

You expressed concern regarding your administration of section 4107 hearings in that you have not noticed them nor required sworn testimony. There is no definition of "public hearing" that is specific to Chapter 4 of the Public Contract Code in which sections 4107 and 4107.5 are located. Black's Law Dictionary 1104 (5th ed. 1979) defines "public" as, "pertaining to a state, nation, or whole community; open to all," and defines "hearing" as, a "proceeding of relative formality . . . generally public." Id. at 649. There is no requirement that section 4107 hearings be noticed to the public. Section 4110 however, does require five (5) days notice of a hearing to a contractor accused of violating any terms of the Chapter.

The hearings called for in sections 4107 and 4107.5 are different. The section 4107 hearing must be public and open to all; sworn testimony is not required. The section 4107.5 hearing must be public and must also comply with the more stringent requirements of testimony under oath. Of course all hearings

must be conducted fairly and impartially, but there appears to be no legal problem with the manner in which the section 4107 hearings are currently handled.

Thank you for your patience and please let me know if I can be of further assistance.

JOHN W. WITT, City Attorney

By

Mary Kay Jackson

Deputy City Attorney

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